

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAPHEAL G RUSSELL,

CASE NO. C13-1743 MJP

Plaintiff,

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS FOR FAILURE TO
PROSECUTE

TODD PACIFIC/VIGOR INDUSTRIES,

Defendant.

THIS MATTER is before the Court on Defendant Vigor Shipyard's ("Defendant")

Motion to Dismiss for Failure to Prosecute. The Court reviewed the motion (Dkt. No. 63),

Plaintiff Rapheal G. Russell's ("Plaintiff") response (Dkt. No. 66), and all related papers. The

Court GRANTS Defendant's Motion to Dismiss for Failure to Prosecute.

Background

Trial is currently set in this matter for December 15, 2014. (Dkt. No. 25). The initial discovery deadline was July 18, 2014. (Id.) On Defendant's motion, this Court has previously extended the discovery deadline three times, allowing Plaintiff's deposition to be scheduled at a later date in order to accommodate Plaintiff's medical and other needs. (Dkt. Nos. 41, 52 and

1 61.) In its October 7, 2014 Order extending the discovery deadline for the third time, the Court
 2 ordered Plaintiff to provide three dates that he would be available for deposition before the
 3 October 28, 2014 deadline within seven days. (Dkt. No. 61.) The Court cautioned Plaintiff that
 4 if he failed to submit to a deposition, the Court would dismiss Plaintiff's case without prejudice
 5 for failure to prosecute. (Id.)

6 On October 13, 2014, Plaintiff faxed a document to Defendant's counsel's office which
 7 stated the following:

8 These days I am providing I may be availbe [sic] the 23rd 24th and the 27th of
 October I will do my best to be available . . .

9 My reading glasses are gone I do have a discriminating hearing loss and is [sic]
 10 unable to communicate with out [sic] my hearing aids . . . [sic] will follow the
 court orders and be there but not be able to communicate or understand what there
 [sic] asking it would be a waste of time. . .

11 (Dkt. No. 64-7.) Defendant moves to dismiss Plaintiff's complaint with prejudice on the grounds
 12 that Plaintiff failed to comply with the Court's Orders regarding his deposition. (Dkt. No. 63.)
 13 Plaintiff opposes dismissal. (Dkt. No. 66.) Plaintiff has also filed a Motion to Continue the
 14 Trial. (Dkt. No. 67.)

Discussion

A. Legal Standard

17 Federal Rule of Civil Procedure 41(b) provides “[i]f the plaintiff fails to prosecute or to
 18 comply with these rules or a court order, a defendant may move to dismiss the action or any
 19 claim against it” and that “[u]nless the dismissal order states otherwise, a dismissal under this
 20 subdivision . . . operates as an adjudication on the merits.” The Ninth Circuit has held courts
 21 should consider five factors in determining whether to dismiss a case for failure to prosecute or
 22 failure to comply with court orders: (1) the public’s interest in expeditious resolution of
 23 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants;

1 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
 2 drastic sanctions. Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

3 **B. Analysis**

4 Dismissal is appropriate in this case because Plaintiff has repeatedly failed to comply
 5 with the Court's Orders regarding his deposition. Defendant argues even after the Court's
 6 October 7, 2014 Order, "Plaintiff has not made himself available for a deposition because despite
 7 his willingness to be 'present,' Plaintiff has made clear that he will be unable to communicate or
 8 understand what is being asked—a necessary prerequisite to giving testimony at a deposition."
 9 (Dkt. No. 63 at 3-4.) Plaintiff argues he provided dates to Defendant's counsel pursuant to the
 10 Court's Order. (Dkt. No. 67.) Plaintiff's argument is unavailing. Plaintiff did not comply with
 11 the Court's Order by offering Defendant three dates that he may be available for deposition and
 12 simultaneously asserting that he would not be able to communicate or understand anything at the
 13 deposition. (Dkt. No. 64-7.)

14 The factors set forth by the Ninth Circuit in Henderson weigh in favor of dismissal in
 15 this case. Given Plaintiff's failure to submit to a deposition pursuant to three Court Orders
 16 entered over a period of about three months, the first factor weighs in favor of dismissal. See
 17 Pagtalunan v. Gaza, 291 F.3d 639, 642 (2002). The second factor weighs in favor of dismissal as
 18 well because Plaintiff's failure to submit to a deposition has consumed some of the Court's time
 19 that could have been devoted to other cases on its docket. Id. To prove prejudice under the third
 20 factor, Defendant must establish Plaintiff's actions "impaired defendant's ability to proceed to
 21 trial or threatened to interfere with the rightful decision of the case." Id. (citing Malone v.
 22 United States Postal Serv., 833 F.2d 128, 131 (9th Cir. 1987)). Defendant contends its ability to
 23 defend itself against Plaintiff's allegations had been "significantly impaired by Plaintiff's refusal
 24

1 to make himself available for deposition" and that because of Plaintiff's conduct, Defendant "has
 2 devoted substantial resources to something other than the actual defense of this case . . ." (Dkt.
 3 No. 63 at 9-10.) The Court finds the third factor also weighs in favor of dismissal, because
 4 Plaintiff's unwillingness to submit to a deposition has compelled Defendant to expend resources
 5 seeking relief from this Court from discovery and other case deadlines instead of preparing its
 6 defense for trial. The fourth factor weighs in favor of dismissal because the Court has extended
 7 the discovery deadline three times in order to accommodate Plaintiff and has warned Plaintiff of
 8 the consequences of his failure to comply with Court Orders. (Dkt. Nos. 41, 52, 61.) The fifth
 9 factor does not weigh in favor of dismissal because public policy favors disposition of cases on
 10 the merits. Pagtalunan, 291 F.3d at 643. On balance, the Henderson factors weigh in favor of
 11 dismissal of this case. However, the Court finds a dismissal with prejudice is inappropriate in
 12 this case. On September 25, 2014, Plaintiff notified the Court that a fire had destroyed his home
 13 and many of his belongings. (Dkt. No. 58.) In light of Plaintiff's present circumstances, the
 14 Court finds a dismissal without prejudice is appropriate.

15 **Conclusion**

16 For the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss for
 17 Failure to Prosecute and DISMISSIS Plaintiff's case without prejudice. (Dkt. No. 63.)
 18 Plaintiff's Motion to Continue the Trial is DENIED as moot. (Dkt. No. 67.)

19
 20 The clerk is ordered to provide copies of this order to all counsel.

21 Dated this 25th day of November, 2014.

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Marsha J. Pechman
 United States District Judge